REQUEST UNDER THE FREEDOM OF INFORMATION ACT

October 15, 2013

National Freedom of Information Office
U.S. EPA
FOIA and Privacy Branch
1200 Pennsylvania Avenue, N.W. (2822T)
Washington, DC 20460

BY ELECTRONIC MAIL: hq.foia@epa.gov, r8foia@epa.gov

RE: Region 8 FOIA Request – Certain Agency Records: James Martin's recently produced EPA- related Email Sent/Received on Non-Official Email Account

To EPA Region 8 FOIA Office/HQ FOIA Officer with responsibility for Region 8,

On behalf of the Competitive Enterprise Institute (CEI), please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq. CEI is a non-profit public policy institute organized under section 501(c)3 of the tax code and with research, investigative journalism and publication functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and related activities at various agencies including the EPA, and how policymakers comply with record-keeping and management requirements, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

Please provide us, within twenty working days,[1] *copies of all EPA-related emails* sent or received, including as cc: or bcc:, on a non-official email account jamesbmartin@me.com by former EPA Region 8 Administrator James B. Martin that were *copied to EPA by Mr. Martin directly or through counsel following Martin's departure from the Agency, as further described herein*.

Background to this Records Request

We are interested in EPA's compliance with its legal obligation to maintain and preserve electronic mail correspondence relating to the performance of official business as federal records and Agency records, and its obligation to obtain and produce copies of such records when created on non-Agency accounts (a practice which the Agency's rules also discourage but which we and congressional investigators have established is nonetheless widespread).

[1] *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion at pages 23-24, *infra*.

Correspondence made or received by federal officials in connection with the transaction of public business is in fact covered by FOIA, which has the broadest definition of "record" of all relevant federal statutes.[2]

As it has with numerous other senior Administration officials, CEI has established Mr. Martin's use of such an account for EPA-related correspondence. Mr. Martin was obligated to copy his EPA office or account on any EPA-related correspondence sent or received by that

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[2] EPA acknowledges on its website that "[t]he definition of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act." *See*, *e.g.,* Environmental Protection Agency, *What Is a Federal Record?*, http://www.epa.gov/records/tools/toolkits/procedures/part2.htm. *See also*, *Frequent Questions about E-Mail and Records*, United States Environmental Protection Agency ("**Can I use a non-EPA account to send or receive EPA e-mail?** No, do not use any outside e-mail system to conduct official Agency business. If, during an emergency, you use a non-EPA e-mail system, you are responsible for ensuring that any e-mail records and attachments are saved in your office's recordkeeping system.") (emphasis in original) (available at www.epa.gov/records/faqs/email.htm).

In determining whether or not a search is "reasonable," courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) ("reasonableness" is assessed "consistent with congressional intent tilting the scale in favor of disclosure"). *See also, e.g., Landmark Legal Foundation v. EPA*, No. 12-1726, 2013 WL 4083285 (D.D.C. Aug. 14, 2013), 2013 WL 4083285, *5 (summary judgment precluded due to inadequate search where "EPA did not search the *personal* email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff," but rather only searched only "accounts *that were in its possession and control*," despite the existence of "evidence that upper-level EPA officials conducted official business from their personal email accounts") (italics in original); *id.* at *8 (noting that "the possibility that unsearched personal email accounts may have been used for official business raises the possibility that leaders in the EPA may have purposefully attempted to skirt disclosure under the FOIA."); Michael D. Pepson & Daniel Z. Epstein, *Gmail.Gov: When Politics Gets Personal, Does the Public Have a Right to Know?*, 13 Engage J. 4, 4 (2012) (FOIA covers emails sent using private email accounts); Senate EPW Committee, Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013) at 8 (FOIA "includes emails sent or received on an employee's personal email account" if subject "relates to official business"), www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7- 40ef-a43b-dec0081b5a62; *accord Mollick v. Township of Worcester*, 32 A.3d 859, 872-73 (Pa.Cmwlth 2011) (officials' private email addresses covered under open-records laws); *Barkeyville Borough v. Stearns*, 35 A. 3d 91, 95-96 (Pa.Cmwlth 2012) (same).

account, and EPA had the obligation to obtain and preserve all such correspondence. It was on this basis that certain described records (Mr. Martin's EPA-related correspondence on non-EPA accounts) were requested by congressional investigators, produced to said investigators, and copied to EPA by Mr. Martin with the assistance of counsel.[3] Now that EPA has obtained these records it is under the obligation to produce all such records in accordance with FOIA.

Specifically, as a result of an earlier CEI FOIA request, congressional investigators initiated a series of discussions with former EPA Region 8 Administrator Martin, who was assisted by legal counsel. As a result of these discussions, which also led to Martin plainly and directly disavow EPA's public insistence that Mr. Martin did not use non-official email accounts to conduct Agency-related correspondence. Because these records were requested, and provided, to House Committee on Oversight and Government Reform (OGR) Darrell Issa and Ranking Member on the Senate Committee on Environment and Public Works (EPW) David Vitter on the grounds that these were EPA-related correspondence, EPA was also copied as required by federal record-management law and NARA and EPA policy.

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[3] *See, e.g.*, Press Release, Senate Committee on Environment and Public Works (Minority), *In Light of New Information, Vitter, Issa Continue Investigation into Inappropriate Record Keeping Practices at EPA*, May 13, 2013, http://www.epw.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=9f04b9b3-9d61-b58f-525b-18ff44d2683f. *See also* linked exemplars of records produced, at same location. *See also*, "Despite the Agency's policy and multiple statements denying the truth, the Committee has discovered that former Region 8 Administrator James Martin regularly used a non-official e-mail account to correspond with individuals and groups outside of EPA, regarding Agency business. For example, Martin regularly communicated with Vickie Patton, General Counsel of the Environmental Defense Fund, about Agency priorities on a private account. On multiple occasions, Martin also corresponded with Alan Salazar, Chief Strategy Officer for Governor Hickenlooper, and staff of the Colorado Conservation League, as well as others." (internal citations omitted) United States Senate Environment and Public Works Committee, Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered*, September 9, 2013, p. 13, http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7-40ef-a43b-dec0081b5a62.

This decision was made in consultation with Mr. Martin's counsel, Raphael Prober of Akin Gump.

As a result of the above facts **no new search beyond EPA simply reviewing the discrete deliveries of the described records is required to satisfy this request**. The records are Agency records, subject to FOIA, already in the Agency's possession.

As the Senate EPW Minority Report also noted

> "Federal agencies, including the EPA, should have a comprehensive and consistent policy on records retention and FOIA administration in accordance with the Federal Records Act (FRA) and the FOIA. The FRA governs the collection, retention, and preservation of federal records. It mandates that all agencies 'create and maintain authentic, reliable, and usable records.' The definition of a record is broad and includes documents, regardless of form or characteristics, made or received by an agency in connection with the transaction of public business. In short, if a document relates to official business, it is considered a record. This includes emails sent or received on an employee's personal email account." (United States Senate Environment and Public Works Committee, Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* at p. 8, internal citations omitted) (see also Presidential Records in the New Millennium: Updating the Presidential Records Act and other Federal Recordkeeping Statutes to Improve Electronic Records Preservation: Hearing Before the H. Comm. on Oversight & Gov't Reform, 112th Cong. 35-37 (2011), available at http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg70518/pdf/CHRG-112hhrg70518.pdf).

Also

> "In addition to the concerns surrounding the Richard Windsor alias email account, the Committee has also uncovered evidence that the use of non-official email accounts was a widespread practice across the Agency. Use of non-official, or personal email accounts expressly violates internal EPA policy that forbids the use of non-official e-mail accounts to conduct official agency business. EPA record keeping policy instructs employees:

> Do not use any outside e-mail system to conduct official Agency business. If, during an emergency, you use a non-official email system, you are responsible for ensuring that any e-mail records and attachments are saved in your office's recordkeeping system.
>
> This policy is meant to ensure that such offline communications do not occur, and on the rare instances in which they do, the documents are still preserved as federal records. To be clear, the medium an agency official uses to communicate is inconsequential to these transparency statutes; if the content qualifies as a federal record, then it should be treated and preserved as such. If such communications are not properly captured and stored, it follows that they will not be produced in response to a FOIA request – resulting in a breach of two federal statutes." United States Senate Environment and Public Works Committee, Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* at p. 12, internal citations omitted but quoting ENVTL. PROT. AGENCY, Frequent Questions about E-Mail and Records, http://www.epa.gov/records/faqs/email.htm)

Regardless, EPA has been provided the records requested herein, which also were requested by congressional investigators and provided by Mr. Martin on the grounds that these were EPA-related correspondence.

EPA Owes CEI a Reasonable Search, Which Includes a Non-Conflicted Search

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994).

It is well-settled that Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (*quoting Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete

with reference to the "'general philosophy of full agency disclosure'" that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). The act is designed to "pierce the veil of administrative secrecy and to open agency action to the light of scrutiny." *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with "the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id*.

A search must be "reasonably calculated to uncover all relevant documents." *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is "reasonable," courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) ("reasonableness" is assessed "consistent with congressional intent tilting the scale in favor of disclosure").

The reasonableness of the search activity is determined ad hoc but there are rules, including that the search must be conducted free from conflict of interest. (In searching for relevant documents, agencies have a duty "to ensure that abuse and conflicts of interest do not occur." *Cuban v. S.E.C.*, 744 F.Supp.2d 60, 72 (D.D.C. 2010). See also *Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; faulting Department of Justice for the fact that it "was aware that employee had withheld records as 'personal' but did not require that 'he submit those records for review' by the Department.)).

Withholding and Redaction

Please identify and inform us of all responsive or potentially responsive records within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive record(s) such objection applies.

If EPA claims any records or portions thereof are exempt under one of FOIA's discretionary exemptions we request you exercise that discretion and release them consistent with statements by the President and Attorney General, *inter alia*, that "**The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today" (President Barack Obama**, January 21, 2009), and "**Under the Attorney General's Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged**. Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5." (Department of Justice, Office of Information Policy, OIP Guidance, "Creating a 'New Era of Open Government'").

Nonetheless, if your office takes the position that any portion of the requested records is exempt from disclosure, please inform us of the basis of any partial denials or redactions. In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. See 5 U.S.C. §552(b).

Further, we request that you provide us with an index of those documents as required under V*aughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA" pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979), and "describ[ing] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information." *King v. Department of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

We remind EPA that it cannot withhold entire documents rather than producing their "factual content" and redacting the confidential advice and opinions. As the D.C. Court of Appeals noted, the Agency must "describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents." *Id.* at 254 n.28. As an example of how entire records should not be withheld when there is reasonably segregable information, we note that basic identifying information (who, what, when) is not "deliberative". As the courts have emphasized, "the deliberative process privilege directly protects advice and opinions and *does not permit the nondisclosure of underlying facts* unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process." *See Mead Data Central v. Department of the Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (emphasis added).

That means, do not redact the requesting party and the Agency's initial determination, or grounds there-for, in the event that determination was a denial. For example, EPA must cease its ongoing pattern with CEI of over-broad claims of b5 "deliberative process" exemptions to

withhold information which is not in fact truly antecedent to the adoption of an agency policy (*see Jordan v. Do*J, 591 F.2d 753, 774 (D.C. Cir. 1978)), but merely embarrassing or inconvenient to disclose (*see e.g.*, EPA's abusive b5 withholdings including also inexplicable withholding *in full* of emails in *CEI v EPA,* D.C.C. CV:12-1617; Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, pp. 25-38, Sept. 11, 2013).

If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. Department of the Air Force*, 455 F.2d at 261.

Claims of non-segregability must be made with the same practical detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Satisfying this Request contemplates providing copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable.

Please provide responsive documents in complete form, with any appendices or attachments as the case may be.

Request for Fee Waiver

This discussion is detailed as a result of our recent experience of agencies, including EPA, improperly using denial of fee waivers to impose an economic barrier to access, an

improper means of delaying or otherwise denying access to public records, despite our history of regularly obtaining fee waivers. We are not alone in this experience.[4]

1) Disclosure would substantially contribute to the public at large's understanding of governmental operations or activities, on a matter of demonstrable public interest

CEI requests waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge...if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester"); see also *inter alia* 31 C.F.R. Part 1, § 1.7(d)(1).

The information sought in this request is not sought for a commercial purpose. Requester is organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization (not a "Religious...Charitable, Scientific, Literary, Testing for Public Safety, to Foster National or International Amateur Sports Competition, or Prevention of Cruelty to Children or Animals Organization[]"). With no possible commercial interest in these records, an assessment of that non-existent interest is not required in any balancing test with the public's interest.

As a non-commercial requester, CEI is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F.

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[4] *See* February 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of "exorbitant fees" under FOIA as a barrier to access, available at http://images.politico.com/global/2012/03/aclufffeewvrfoialtr.pdf; *see also National Security Counselors v. CIA* (CV: 12-cv-00284(BAH), filed D.D.C Feb. 22, 2012); *see also* "Groups Protest CIA's Covert Attack on Public Access," OpentheGovernment.org, February 23, 2012, http://www.openthegovernment.org/node/3372.

Supp. 2d 1 (D.D.C. Nov. 30, 2010). Specifically, the public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. "The legislative history of the fee waiver provision reveals that it was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,' in particular those from journalists, scholars and nonprofit public interest groups." *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D.Mass. 1984); SEN. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).[5]

Congress enacted FOIA clearly intending that "fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." *Ettlinger v. FBI*, citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at 8. Improper refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Ettlinger v. FBI*.

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[5] This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, public interest non-profits that "rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." *Better Gov't v. State*. They therefore, like Requester, "routinely make FOIA requests that potentially would not be made absent a fee waiver provision", requiring the court to consider the"Congressional determination that such constraints should not impede the access to information for appellants such as these." *Id*.

Given this, "insofar as ...[agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information." *Better Gov't v. State* (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that "'chill' the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage." *Id*. As such, Agency implementing regulations may not facially or in practice interpret FOIA's fee waiver provision in a way creating a fee barrier for Requester.

"This is in keeping with the statute's purpose, which is 'to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers.'" *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987)(quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy).

Requester's ability to utilize FOIA -- as well as many nonprofit organizations, educational institutions and news media who will benefit from disclosure -- depends on its ability to obtain fee waivers. For this reason, "Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the 'public benefit' test for FOIA fee waivers. This waiver provision was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,' in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups.

Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as '"toll gates" on the public access road to information.'" *Better Gov't Ass'n v. Department of State*.

As the *Better Government* court also recognized, public interest groups employ FOIA for activities "essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." That is true in the instant matter as well. Indeed, CEI is precisely the sort of group the courts have identified in establishing this precedent.

Courts have noted FOIA's legislative history to find that a fee waiver request is likely to pass muster "if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286.

This information request meets that description, for reasons both obvious and specified.

The subject matter of the requested records specifically concerns identifiable operations or activities of the government. The requested records directly relate to high-level promises by the President of the United States and the Attorney General to be "the most transparent administration in history", and a practice that is increasingly being proved to be widespread within the administration (use of non-official email accounts for work-related

correspondence), in that they beg the question whether EPA is properly maintaining certain EPA-related records, created on an account that is not an official account but is one owned by Mr. Martin and solely under her control, obviously in violation of the Anti-Deficiency Act (31 U.S.C. § 1341), Federal Records Act (44 U.S.C. § 3301), used for EPA-related correspondence by Mr. Martin despite the obvious impropriety of doing so.

This promised transparency in its serial incarnations demanded and spawned widespread media coverage, and then of the reality of the Administration's transparency efforts, and numerous transparency-oriented groups reporting on this performance, prompting further media and public interest (*see, e.g.*, an internet search of "study Obama transparency").

Particularly after requester's recent discoveries using FOIA, its publicizing certain Agency record-management and electronic communication practices, controversial EPA correspondence (*e.g.*, re: Richard Windsor, use of non-official email accounts, destroying text messages), and CEI's other efforts to disseminate the information, the public, media and congressional oversight bodies are very interested in how widespread are the violations of this pledge of unprecedented transparency.

This request, when satisfied, will further inform this ongoing public discussion.

We emphasize that **a Requester need not demonstrate that the records would contain any particular evidence, such as of misconduct.** Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir 2003).

Potentially responsive records reflecting whether or not EPA has maintained and preserved a certain class of correspondence sent and received on a non-official account -- particularly these records as described above, due to the circumstances described, above -- unquestionably reflect "identifiable operations or activities of the government."

The Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. There can be no question that this is such a case.

Disclosure is "likely to contribute" to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request. The disclosure of the requested records has an informative value and is "likely to contribute to an understanding of Federal government operations or activities" just as did various studies of public records reflecting on the Administration's transparency, returned in the above-cited search "study obama transparency", and the public records themselves that were released to the groups cited in those news reports contributed to public understanding of specific government operations or activities: this issue is of significant and increasing public interest, in large part due to the Administration's own promises and continuing claims, and revelations by outside groups accessing public records. To deny this and the substantial media and public interest, across the board from Fox News to PBS and The Atlantic, would be arbitrary and capricious, as would be denial that shedding light on **this particularly notorious example** of the issue (Mr. Martin resigned, obtained counsel, and produced large quantities of emails from a non-official account) would further and significantly inform the public.

Further, CEI is preparing a report on the contents of Mr. Martin's and other senior EPA officials' use of non-official accounts and EPA officials' relationships with certain industry players, activist academics and environmentalist pressure groups.

However, **the Department of Justice's Freedom of Information Act Guide makes it clear that, in the DoJ's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain.** There is no reasonable claim to deny that, to the extent the requested information is available in the public domain; these are forms obtained and held only by the EPA official or, in the event she and EPA did in fact comply with the law, by EPA and this official. Further, however, **this aspect of the important public debate, of the use by senior officials of non-official email accounts and related Agency practices, is presently unfolding (*e.g.*, EPA has produced or is producing the emails of two former Regional Administrators whom CEI discovered were using their private email accounts for work-related correspondence, and issue which has become the subject of congressional oversight including a recent hearing and calls for inspector general scrutiny.** It is therefore clear that the requested records are "likely to contribute" to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons. CEI intends to post these records for public scrutiny and otherwise to broadly disseminate the information it obtains under this request by the means described, herein. CEI has spent years promoting the public interest advocating sensible policies to protect human health and the

environment, routinely receiving fee waivers under FOIA (until recently, but even then on appeal) for its ability to disseminate public information. Further, as demonstrated herein and in the above litany of exemplars of newsworthy FOIA activity, requester and particularly undersigned counsel have an established practice of utilizing FOIA to educate the public, lawmakers and news media about the government's operations and, in particular, have brought to light important information about policies grounded in energy and environmental policy, including EPA's, specifically in recent months relating to transparency and electronic record practices. EPA has not exacted fees for these requests for the same reason it cannot now, and also cannot now for all reasons stated herein.

Requester intends to disseminate the information gathered by this request via media appearances (the undersigned appears regularly, to discuss his work, on national television and national and local radio shows, and weekly on the radio shows "Garrison" on WIBC Indianapolis and the nationally syndicated "Battle Line with Alan Nathan").

Requester also publishes materials based upon its research via print and electronic media, as well as in newsletters to legislators, education professionals, and other interested parties.[6] For a list of exemplar publications, please see http://cei.org/publications. Those activities are in fulfillment of CEI's mission. We intend to disseminate the information gathered by this request to the public at large and at no cost through one or more of the following: (a) newsletters; (b) opinion pieces in newspapers or magazines; (c) CEI's websites, which receive approximately

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[6] *See EPIC v. DOD*, 241 F.Supp.2d 5 (D.D.C. 2003) (court ruled that the publisher of a bi-weekly electronic newsletter qualified as the media, entitling it to a waiver of fees on its FOIA request)*; Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005) (fee waiver granted for group that "aims to place the information on the Internet"; "Congress intended the courts to liberally construe the fee waiver requests of noncommercial entities").

150,000 monthly visitors (appx. 125,000 unique) (*see, e.g.,* www.openmarket.org, one of several blogs operated by CEI providing daily coverage of legal and regulatory issues, and www.globalwarming.org (another CEI blog)); (d) in-house publications for public dissemination; (e) other electronic journals, including blogs to which our professionals contribute; (f) local and syndicated radio programs dedicated to discussing public policy; (g) to the extent that Congress or states engaged in relevant oversight or related legislative or judicial activities find that which is received noteworthy, it will become part of the public record on deliberations of the legislative branches of the federal and state governments on the relevant issues.

CEI also is regularly cited in newspapers,[7] law reviews,[8] and legal and scholarly publications.[9]

More importantly, with a foundational, institutional interest in and reputation for its leading role in the relevant policy debates and expertise in the subject of transparency, energy- and environment-related regulatory policies CEI unquestionably has the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the "public-at-large."

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[7] *See, e.g.,* Al Neuharth, "Why Bail Out Bosses Who Messed It Up," *USA Today*, Nov. 21, 2008, at 23A (quotation from Competitive Enterprise Institute) (available at 2008 WLNR 22235170); Bill Shea, "Agency Looks Beyond Criticism of Ads of GM Boasting About Repaid Loan," *Crain's Detroit Business*, May 17, 2010, at 3 (available at 2010 WLNR 10415253); Mona Charen, Creators Syndicate, "You Might Suppose That President Obama Has His Hands ...," *Bismarck Tribune*, June 10, 2009, at A8 (syndicated columnist quoted CEI's OpenMarket blog); Hal Davis, "Earth's Temperature Is Rising and So Is Debate About It," *Dayton Daily News*, April 22, 2006, at A6 (citing CEI's GlobalWarming.Org); *Washington Examiner*, August 14, 2008, pg. 24, "Think-Tanking" (reprinting relevant commentary from OpenMarket); Mark Landsbaum, "Blogwatch: Biofuel Follies," *Orange County Register*, Nov. 13, 2007 (citing OpenMarket) (available in Westlaw news database at 2007 WLNR 23059349); *Pittsburgh Tribune-Review*, "Best of the Blogs," Oct. 7, 2007 (citing OpenMarket) (available in Westlaw news database at 2007 WLNR 19666326).

[8] *See, e.g.,* Robert Hardaway, "The Great American Housing Bubble," 35 *University of Dayton Law Review* 33, 34 (2009) (quoting Hans Bader of CEI regarding origins of the financial crisis that precipitated the TARP bailout program).

[9] *See, e.g.,* Bruce Yandle, "Bootleggers, Baptists, and the Global Warming Battle," 26 *Harvard Environmental Law Review* 177, 221 & fn. 272 (citing CEI's GlobalWarming.Org); Deepa Badrinarayana, "The Emerging Constitutional Challenge of Climate Change: India in Perspective," 19 *Fordham Environmental Law Review* 1, 22 & fn. 119 (2009) (same); Kim Diana Connolly, "Bridging the Divide: Examining the Role of the Public Trust in Protecting Coastal and Wetland Resources," 15 *Southeastern Environmental Law Journal* 1, 15 & fn. 127 (2006) (same); David Vanderzwaag, *et al.*, "The Arctic Environmental Protection Strategy, Arctic Council, and Multilateral Environmental Initiatives," 30 Denver Journal of International Law and Policy 131, 141 & fn. 79 (2002) (same); Bradley K. Krehely, "Government-Sponsored Enterprise: A Discussion of the Federal Subsidy of Fannie Mae and Freddie Mac, 6 North Carolina Banking Institute 519, 527 (2002) (quoting Competitive Enterprise Institute about potential bailouts in the future).

The disclosure will contribute "significantly" to public understanding of government operations or activities. *We repeat and incorporate here by reference the arguments above from the discussion of how disclosure is "likely to contribute" to an understanding of specific government operations or activities*.

After disclosure of these records, the public's understanding of this highly controversial and, it is increasingly clear, widespread practice by executive branch officials, and administration transparency and compliance with relevant laws, will inherently be significantly enhanced. The requirement that disclosure must contribute "significantly" to the public understanding is therefore met.

As such, the Requester has stated "with reasonable specificity that its request pertains to operations of the government," and "the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

2) **Alternately, CEI qualifies as a media organization for purposes of fee waiver**

The provisions for determining whether a requesting party is a representative of the news media, and the "significant public interest" provision, are not mutually exclusive. Again, as CEI is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*. Alternately and only in the event EPA deviates from prior practice on similar requests and refuses to waive our fees under the "significant public interest" test, which we will then appeal while requesting EPA

proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by.... a representative of the news media...") and 40 C.F.R. §2.107(d)(1) ("No search or review fees will be charged for requests by educational institutions...or representatives of the news media."); see also 2.107(b)(6).

However, we note that as documents are requested and available electronically, there are no copying costs. Even paper copies are easily scanned into electronic format.

Requester repeats by reference the discussion as to its publishing practices, reach and intentions to broadly disseminate, all in fulfillment of CEI's mission from pages 17-20, *supra*.

The information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with Agency activities in this controversial area, or as the Supreme Court once noted, what their government is up to.

For these reasons, Requester qualifies as a "representative of the news media" under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, including after the 2007

amendments to FOIA. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women's Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format; as such, there are no duplication costs other than the cost of a compact disc(s).

CONCLUSION

We expect the Agency to release within the statutory period of time all segregable portions of responsive records containing properly exempt information, and to provide information that may be withheld under FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears).

We expect all aspects of this request be processed free from conflict of interest.

We request the Agency provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). EPA must at least inform us of the scope of potentially responsive records, including the scope of the

records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions; FOIA specifically requires EPA to immediately notify CEI with a particularized and substantive determination, and of its determination and its reasoning, as well as CEI's right to appeal; further, FOIA's unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013). See also; *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at *14 (D.D.C. Sept. 28, 2011)(addressing "the statutory requirement that [agencies] provide estimated dates of completion").

We request a rolling production of records, such that the Agency furnishes records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the address below. We inform EPA of our intention to protect our appellate rights on this matter at the earliest date should EPA not comply with FOIA per, *e.g.*, *CREW v. FEC*.

If you have any questions please do not hesitate to contact me.

Respectfully submitted,

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